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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PARNELL COLVIN,)	CASE NO. 2:20-cv-01765-APG-EJY
)	
Plaintiff,)	PLAINTIFF'S RESPONSE TO
)	DEFENDANT'S SEVENTH MOTION IN
vs.)	LIMINE TO EXCLUDE EVIDENCE OR
)	ARGUMENT REGARDING EXPRESSION
M.J. DEAN CONSTRUCTION, INC.,)	OF "PRO-TRUMP" BELIEFS AT THE
)	JOBSITE
Defendant.)	
)	Trial: March 27, 2023
)	Time: 9:00 a.m.
)	Judge: Honorable Andrew Gordon

Plaintiff PARNELL COLVIN ("Plaintiff" or "Colvin") submits this Response to Defendant M.J. Dean Construction, Inc.'s ("Defendant" or "M.J. Dean Construction") Seventh Motion in Limine to exclude evidence or argument regarding expression of pro-Trump beliefs at the jobsite.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

This is a race-based employment discrimination action. Plaintiff Colvin is black. His legal

1 claims of (1) retaliation, (2) discrimination regarding overtime opportunities, (3) harassment and
2 (4) negligent training and supervision will be heard at trial. He seeks lost wages and
3 compensatory damages for pain and suffering, including humiliation, embarrassment and
4 emotional distress relative to the above legal claims. He also seeks attorney's fees and costs.

5 M.J. Dean Construction's seventh motion seeks to exclude evidence or argument regarding
6 expression of pro-Trump beliefs at the jobsite.

7 The motion seems to suggest that any mention of Donald Trump name has no relevance to
8 any issue in the lawsuit, and even if it did, the prejudicial impact of the evidence outweighs the
9 probative value of it.

10 Plaintiff does not seek to show that because someone at the worksite supported Trump they
11 were a white supremacist or racist like the Defendant argues.

12 Rather Plaintiff will show that pro-Trump speech or graffiti at the worksite mixed in with
13 racist and white supremacist speech or graffiti could be evidence that a hostile work environment
14 was present at the jobsite. For example some of the graffiti Plaintiff saw and reported referenced
15 Trump and Kevin Gutierrez said in his deposition that some of the white supremacist talk he heard
16 on the jobsite was made by Trump supporters and related to Trump and his 2020 reelection.

17 Thus pro-Trump speech at the jobsite might be relevant to issues in the case when it was
18 mixed in with racist and white supremacist speech or graffiti and thus help to show that a hostile
19 environment was present at the jobsite.

20 And while the evidence might be prejudicial depending on what the presentation of the
21 evidence is, all evidence is prejudicial to some extent, and it should not be excluded if its
22 probative value clearly outweighs any prejudice M.J. Dean Construction might incur by the
23 presentation of the evidence.

24 Finally like most of the motions in limine being filed by M.J. Dean Construction, asking
25 for a blanket exclusion without knowing what will be presented at trial is prejudicial to Colvin's
26 right to present relevant evidence at trial. If some evidence is presented that mentions Trump's
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1 name is presented, an objection can be made at that time, but just saying that no mention of Trump
 2 is proper without knowing the context of what evidence is being presented goes way beyond what
 3 is needed and risks the exclusion of relevant evidence that could support Plaintiff's case.

4 II.

5 THIS COURT MAY EXCLUDE EVIDENCE IN ADVANCE OF 6 TRIAL BY WAY OF AN IN LIMINE MOTION

7 The Court has authority to grant a motion in limine, in advance of trial, which excludes
 8 inadmissible evidence, as well as any and all reference by the parties, attorneys and witnesses to
 9 the inadmissible evidence. *Luce v. U.S.*, 469 U.S. 38, 41 (1984), 16 Fed. R. Evid. Serv. 833
 10 (1984); *U.S. v. Lachman*, 48 F.3d 586, 590-94, 41 Fed. R. Evid. Serv. 339 (1st Cir. 1995).

11 In addition, Federal Rules of Evidence 103(c) and 104(c) allow the court to hear and
 12 determine the question of the admissibility of evidence outside the presence or hearing of the jury.
 13 *Williams v. Board of Regents of University System of Georgia*, 629 F.2d 993, 999-1001 (5th Cir.
 14 1980).

15 III.

16 EVIDENCE OR ARGUMENT REFERENCING THE TRUMP NAME OR PRO TRUMP 17 BELIEFS MIGHT BE RELEVANT TO ISSUES PRESENTED IN THE CASE AND 18 THEREFORE SHOULD NOT BE EXCLUDED FROM INTRODUCTION AT TRIAL 19 AND AT ANY RATE SHOULD NOT BE EXCLUDED AT THIS POINT WITHOUT 20 KNOWING EXACTLY WHAT THE EVIDENCE IS

21 Federal Rule of Evidence 401 provides that "evidence is relevant if (a) it has any tendency
 22 to make a fact more or less probably than it would be without the evidence; and (b) the fact is of
 23 consequence in determining the action." *Huddleston v. U.S.*, 485 U.S. 681, 682-92, 25 Fed. R.
 24 Evid. Serv. 1 (1988); *U.S. v. Brandon*, 17 F.3d 409, 443-46 (1st Cir. 1994) (rejected on other
 25 grounds by, *U.S. v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998)). Evidence must be excluded
 26 where it is not relevant to matters at issue. *Federal Rule of Evidence 402*; *Arlio v. Lively*, 474 F.3d
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1 46 (2nd Cir. 2007) (evidence regarding a prior arbitration was irrelevant and should have been
2 excluded); *U.S. v. Edwards*, 631 F.2d 1049, 1051 (2d Cir. 1980) (trial judge had discretion to
3 exclude two witnesses that were offered by the defendant as irrelevant and collateral.)

4 In this case Colvin does *not* seek to argue that just because the Trump name or pro-Trump
5 views are mentioned that that is racist, white supremacist speech that created a racially hostile
6 environment.

7 On the other hand some of the evidence in this case includes the mention of Trump and to
8 exclude that evidence (especially at this point) would be wrong.

9 For example one of the pieces of graffiti Colvin observed in the restroom said, “burn all
10 NIGGERS-White Power-Trump 2020”. In addition when Kevin Gutierrez was asked in his
11 deposition “During 2020, was there white supremacy talk relating to Trump’s reelection?”,
12 answer: “Yes”. Depo. Gutierrez, 40:21-25. “What was the nature of the white supremacy talk on
13 the Sphere project in 2020?, answer: “Trump supporters”. Depo. Gutierrez, 41:8-10.

14 Donald Trump has become the face of white supremacy in America for many. This is
15 supported by quotes he made during his presidency, among other, in reference to a violent white
16 nationalist rally Charlottesville, Virginia in 2017 that there were “very fine people on both sides”
17 and telling the Proud Boys a white supremacist hate group in the 2020 presidential debate to
18 “stand back and stand by”.

19 Not surprisingly Trump has become a figure that white supremacist and white nationalist
20 look up to, so to exclude the mention of his name when speech, graffiti, etc. in this case mentions
21 it would unduly prejudicial to Plaintiff’s ability to present his case. White supremacist and racist
22 speech, graffiti, etc. mention his name for a reason and the speech, graffiti, etc. should not be
23 excluded just because Trump’s name or support for him is included in it.

24 Finally motions in limine are improper where it is not know exactly what evidence will be
25 presented at trial. Often the trial judge must wait until the context of the trial before the judge can
26 assess the factual context of the evidence and determine the admissibility of it. Actual testimony
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1 often defies pretrial predictions of what a witness will say on the stand. *U.S. v. Cline*, 188 F. Supp.
2 2d 1287, 1291, 59 Fed. R. Evid. Serv. 99 (D. Kan. 2002), aff'd 349 F.3d 1276 (10th Cir. 2003).

3 Here Defendant wants a blanket exclusion of any mention of the Trump name, pro-Trump
4 sentiment, etc. without knowing what actual testimony or evidence will be presented. It would be
5 much more prudent at this point for the Court to wait to decide the admissibility of any mention of
6 the Trump name, pro-Trump sentiment, etc. until such time which it is presented at trial.

7 IV.

8 **EVIDENCE OR ARGUMENT REFERENCING THE TRUMP NAME OR PRO TRUMP** 9 **BELIEFS SHOULD NOT BE EXCLUDED PURSUANT TO FEDERAL RULE OF** 10 **EVIDENCE 403**

11 Under Federal law, evidence should be excluded when the prejudicial impact of the
12 evidence outweighs the probative value of it. *Old Chief v. U.S.*, 519 U.S. 172, 180-92, 45 Fed. R.
13 Evid. Serv. 835 (1997); *U.S. v. Aguilar-Aranceta*, 58 F.3d 796, 800-02, 42 Fed. R. Evid. Serv. 843
14 (1st Cir. 1995); *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343, 59 Fed. R. Evid. Serv. 431
15 (3rd Cir. 2002).
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17 In fact, Federal Rule of Evidence 403 specifically states, "The court may exclude relevant
18 evidence if its probative value is substantially outweighed by a danger of one or more of the
19 following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting
20 time, or needless presenting cumulative evidence."

21 Defendant essentially argues that if jurors are against Trump and they hear his name or
22 support for him, they are going to decide against M.J. Dean Construction on that basis. This is
23 probably a false assumption, but the flipside of that argument is jurors are for Trump they will
24 decide for M.J. Dean Construction.

25 But the real inquiry should be, should the evidence be excluded just on that basis. The
26 mention of Trump's name or support for him is highly probative because as mentioned above his
27 name came up a lot as part of the case. As set forth above, Colvin doesn't plan to argue that just
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1 because someone supported Trump that they were racist or supported white supremacy. On the
2 other hand, if pro-Trump speech, graffiti, etc. is mixed in with racist, anti-black, white supremacist
3 views it should not be excluded just because it could be prejudicial.

4 As set forth above, all evidence is prejudicial to some extent, and it should not be excluded
5 if its probative value clearly outweighs any prejudice that might occur by the presentation of the
6 evidence.

7 This being the case, the evidence should not be excluded pursuant to Federal Rule of
8 Evidence 403 or at least a determination on whether the evidence is excluded should wait until
9 which time that it is actually presented.

10
11 **V.**

12 **CONCLUSION**

13 For all the reasons stated above, Plaintiff requests that this Court *not* exclude evidence or
14 argument of Trump's name or pro-Trump beliefs at the jobsite or at least wait to trial to do so.

15 DATED: 3/10/2023

LAW OFFICES OF MICHAEL P. BALABAN

17 BY: /s/ Michael P. Balaban

18 Michael P. Balaban, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to FRCP Rule 5(b)(3) and LR IC 4-1(a), a true and correct copy of the foregoing document was electronically served via the Court's CM/ECF electronic filing system to the following persons on March 10, 2023:

Martin A. Little, Esq.
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/s/ Michael P. Balaban
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